



International Tribunal for the  
Prosecution of Persons Responsible for  
Serious Violations of International  
Humanitarian Law Committed in the  
Territory of The Former Yugoslavia  
since 1991

Case No. IT-98-30/1-T

Date 30 October 2000

Original: English  
French

---

**IN THE TRIAL CHAMBER**

**Before:** Judge Almiro Rodrigues, Presiding  
Judge Fouad Riad  
Judge Patricia Wald

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Decision of:** 30 October 2000

**THE PROSECUTOR**

v.

**MIROSLAV KVOČKA  
MILOJICA KOS  
MLAĐO RADIĆ  
ZORAN ŽIGIĆ  
DRAGOLJUB PRČAĆ**

**PARTLY CONFIDENTIAL**

---

**DECISION ON PROSECUTION NOTICE OF AFFIDAVIT EVIDENCE**

**The Office of the Prosecutor:**  
Ms. Brenda Hollis  
Mr. Michael Keegan  
Mr. Kapila Waidyaratne

**Defence Counsels:**  
Mr. Krstan Simić for Miroslav Kvočka  
Mr. Zarko Nikolić for Milojica Kos  
Mr. Toma Fila for Mlado Radić  
Mr. Slobodan Stojanović for Zoran Žigić  
Mr. Jovan Simić for Dragoljub Prcać

**TRIAL CHAMBER I** (“the Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“the Tribunal”);

**NOTING** that on 15 September 2000, the Prosecution filed a notice of ten affidavits (“The Notice”) accompanied by several annexes; that annex A of the Notice contains the formal statements of witnesses 1 to 6 listed in the confidential Annex attached to the present decision (“attached Annex”) and that these statements were signed in a place which is unknown as this information was redacted; that Annex A of the Notice contains two transcripts of witnesses 7 and 8 listed in the attached Annex, that an annex is attached to the transcript of witness 7 and that transcript of witness 7 is signed by him but the annex attached to the transcript is not signed; that Annex A of the Notice contains the formal statements of two other witnesses, witnesses 9 and 10 listed in the attached Annex, which are signed and certified; that Annex C of the Notice contains charts of points of corroboration between the affidavits and live witnesses who already testified and who will testify;

**NOTING** that the Defence<sup>1</sup> objected to the filing of the Prosecution on the ground that the Notice fails to provide a clear link between the live testimony and the affidavits; that the Notice must be filed prior to the testimony of the live witness; that the Notice fails to indicate in which State the affidavits were taken and that the Notice proposes the transcript of the deposition of a witness (Witness 8 listed in the attached Annex) from the trial in the case *Prosecutor v Dušan Tadić*, Case No. IT-94-1, which is in contravention to the language of Rule 94 *ter*;

**NOTING** the Chamber’s Decision dated 25 September 2000<sup>2</sup>, ruling that the disputed facts have been “sufficiently well-described or focused” by the Prosecution; that the Prosecution should submit a revised list of those witnesses who will testify during the last two weeks of the Prosecution case, along with a document indicating which affidavits or formal statements would corroborate the testimony of the live witnesses; and that the Defence must submit a single motion, if any, indicating whether they wish or not to cross-examine the affiants;

---

<sup>1</sup> Objection to the Prosecutor’s notice of affidavits filed pursuant to Rule 94 *ter* of the accused Miroslav Kvočka dated 20 September 2000; Defense Response to the Prosecution’s notice of affidavits of the accused Mlado Radić and Dragoljub Prcać dated 21 September 2000; Response by the Accused Milojica Kos to the Prosecutor’s notice of affidavits filed pursuant to Rule 94 *ter* on 15 September 2000 dated 22 September 2000.

**NOTING** that on 21 and 26 September 2000, the Prosecution filed its lists of witnesses to be called from 25 September to 6 October 2000; that on 4 October 2000, the Prosecution filed a “Notice of revised points of corroboration charts for affidavits filed pursuant to Rule 94 *ter*” (“the Revised Notice”) for corroboration of those witnesses who have testified since the filing of the affidavits on 15 September 2000 and for corroboration of witnesses listed in the alternate list, who may be called as witnesses should any of the remaining witnesses who are currently testifying fail to appear;

**NOTING** the Objection of the accused Miroslav Kvočka dated 10 October 2000, the “Objection of the Accused Milojica Kos Regarding Prosecution Affidavits Evidence Pursuant to Rule 94 *ter*” dated 13 October 2000, the “Additional Defence Notification in Regard of Prosecution Affidavit Evidence” of the accused Mlado Radić and Dragoljub Prcać dated 16 October 2000, the objection of Milojica Kos dated 23 October 2000 and the objection of Miroslav Kvočka filed on 25 October 2000, in which the Defence submit generally that the Prosecution has failed to file its affidavit evidence in accordance with the provisions of Rule 94 *ter* and with the Chamber Order dated 25 September 2000;

**CONSIDERING** that the Defence of the accused Radić, Prcać, Kvočka and Kos contends that it has received the Revised Notice in mid-October 2000, that it submits generally that the Revised Notice contains some contradictions and that the formal statements were redacted; that the Defence was thus unable to prepare for the cross-examination of the live witnesses;

**CONSIDERING** that on 20 October 2000, the Prosecution responded that it complied with the Chamber’s Order; that certified affidavits are presumed to be regularly certified; that a transcript can be tendered as affidavit evidence in conformity with the terms and the spirit of Rule 94 *ter*; that it belongs to the Chamber to decide upon the weight to give to evidence if there is any contradiction between the affidavit and the testimony of the live witness and that it belongs to the opposing party, requesting the cross examination of affiants, to prove the necessity of such cross examination, which has not been done in this case;

**CONSIDERING** that Rule 94 *ter* allows for departure from the principle of in-court testimony but provides for “strict procedural protection”<sup>3</sup>, namely that affidavits be signed in accordance with the law and procedure of the State in which they are signed and are admissible only if filed prior to the

---

<sup>2</sup> Oral Decision, T, p 5595-5597.

<sup>3</sup> See *Prosecutor v Dario Kordić and Mario Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, 21 July 2000, para 21.

live testimony of the witness through whom they are tendered as corroboration for a fact in dispute testified to by the live witness; that departure from the precise terms of Rule 94 *ter* is permitted if it is not “more than of a technical procedural nature”;<sup>4</sup>

**CONSIDERING** that the findings and the language of the Appeals Chamber’s Decision of 18 September 2000<sup>5</sup> govern the issue regarding the interpretation and application of Rule 94 *ter* before the Chamber; that the Appeals Chamber decided that the timing requirement in Rule 94 *ter* is not a mere “technical requirement”<sup>6</sup>, that “the protections afforded by the Rule are sufficient to alleviate any concerns should the affiant not be called for cross-examination by ensuring that in any event, the evidence is not unchallenged”<sup>7</sup> and that “a clear link must be established between the testimony and the affidavit and the corroborating evidence must be focused on facts contained in the live testimony and not on the surroundings events of the case in general”;<sup>8</sup>

**CONSIDERING** as a preliminary matter, that many of the facts to be corroborated are not in dispute, as they were already stipulated;<sup>9</sup> that sufficient corroborating evidence was presented before the Trial Chamber for many of the other facts<sup>10</sup> so that admitting such cumulative evidence would go against the purpose of a Rule designed to expedite proceedings;

**CONSIDERING** however that some of the facts to be corroborated by the affidavits in the Notice could be relevant,<sup>11</sup> thus the Chamber must examine the Defense contention that the form of the affidavits does not meet the requirements of Rule 94 *ter*;

<sup>4</sup> *Prosecutor v Dario Kordić and Mario Čerkez*, Decision on Appeal on the Admission into Evidence of Seven Affidavits and one Formal Statement, Case No. IT-95-14/2-AR73.5, 18 September 2000, para 32.

<sup>5</sup> *Prosecutor v Dario Kordić and Mario Čerkez*, Decision on Appeal on the Admission into Evidence of Seven Affidavits and one Formal Statement, Case No. IT-95-14/2-AR73.5, 18 September 2000.

<sup>6</sup> *Ibid*, para 34.

<sup>7</sup> *Ibid*, para 38.

<sup>8</sup> *Ibid*, para 40.

<sup>9</sup> See the “Decision on Judicial Notice” in the present case dated 8 June 2000. The following facts are not in dispute: “Beginning in May 1992, there was an attack on Bosnian Muslim and Bosnian Croat villages, areas, and neighbourhoods in the Prijedor municipality by Serb forces.”; “During and after the attacks, Bosnian Muslim, Bosnian Croat and other non-Serb civilians were killed.” .

<sup>10</sup> For instance, the facts that: “The hygienic conditions in Trnopolje Camp were poor resulting in diseases, lice and dysentery.”; “ Food was sparse, consisting mainly of soup or food detainees could find on their own” ; “Detainees were beaten regularly in camp.”; “Beatings occurred regularly during interrogations.”; “Beatings occurred on all three shifts”; “ Krkan’s shift was the most cruel of the three shifts.”.

<sup>11</sup> For instance, the facts that: “the body of Idriz Jakupović was on the grass outside the white house; “Miroslav Šoljaja was badly beaten”; “Rizah Hadžalić and Idriz Jakupović were beaten to death”; “Edna Dautović and Sedeta Medunjanin were called out around 24 July 1992 and have never been seen since and Sedeta Medunjanin’s older son was beaten and tortured”; “Miroslav Kvočka was in a position to give aid to the detainees but did nothing to alleviate their suffering”.

**CONSIDERING** that certification of affidavits is a substantial formality, a necessary part of the process allowing the opposing party to assess the truthfulness of the witness statement; that the lack of such certification could have “an adverse effect upon the integrity of the proceedings or the rights of the accused”;<sup>12</sup> that in the present case, out of the ten affidavits submitted, eight affidavits are certified<sup>13</sup> but six of these eight affidavits have the certification redacted;<sup>14</sup> that the Defense and the Chamber are not in a position to know whether the six affidavits are certified in accordance with the terms of Rule 94 *ter*; that should the Prosecution deem it necessary to redact elements of the affidavits, it is her duty and responsibility to seek the Chamber’s authorisation prior to the filing of the affidavits; that the certification not being provided prior to the testimony of the live witnesses, the Chamber deems that affidavits of Witnesses 1 to 6 do not meet the requirements of Rule 94 *ter*;

**CONSIDERING** that the Defense of the accused Kvočka objects that the two affidavits of Witnesses 9 and 10 are signed in Bosnia-Herzegovina and certified by a Judge there, but that the certification was not done in accordance with the law and the procedure of Bosnia-Herzegovina; that a judge, and not an investigator of the Office of the Prosecutor, should have taken the statement; the Chamber deems therefore that the affidavits of Witnesses 9 and 10 do not meet the requirements of Rule 94 *ter*;

**CONSIDERING** that the Prosecution introduced as affidavit evidence the two transcripts of Witnesses 7 and 8 from another case; that the one from Witness 7 is signed but accompanied by an unsigned annex and that the other one from Witness 8 is unsigned; that the Tribunal’s Rules are silent on whether a transcript can be tendered as affidavit; that, however, in accordance with the Tribunal’s appeals Chamber Decision dated 18 September 2000<sup>15</sup>, Rule 94 *ter* should be interpreted strictly; that a transcript, not being a formal statement signed and certified in accordance to the law and the procedure of the State in which it is signed, does not fall under the terms of Rule 94 *ter*; that thus transcripts of Witnesses 7 and 8 do not meet the requirements of Rule 94 *ter*;

**CONSIDERING** that as the proposed affidavits do not meet the requirements of Rule 94 *ter*, they are not admissible as affidavit evidence;

---

<sup>12</sup> *Prosecutor v Dario Kordić and Mario Čerkez*, Decision on Appeal on the Admission into Evidence of Seven Affidavits and one Formal Statement, Case No. IT-95-14/2-AR73.5, 18 September 2000, para 32.

<sup>13</sup> The affidavit of Witness 7 in the attached Annex is a signed transcript and the affidavit of Witness 8 in the attached Annex is an unsigned transcript.

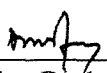
<sup>14</sup> The affidavits of witnesses 9 and 10 listed in the attached Annex are not redacted.

**PURSUANT** to Rules 54, 89 and 94 *ter* of the Rules of Procedure and Evidence;

**FOR THE ABOVE MENTIONED REASONS,**

**REJECTS** the Prosecution notice of affidavit filed pursuant to Rule 94 *ter*.

Done in English and French, the English text being authoritative.

  
\_\_\_\_\_  
Almiro Rodrigues  
Presiding Judge

Done this 30 Day of October 2000,  
At The Hague  
The Netherlands.

**[Seal of the Tribunal]**

---

<sup>15</sup> *Prosecutor v Dario Kordić and Mario Čerkez*, Decision on Appeal on the Admission into Evidence of Seven Affidavits and one Formal Statement, Case No. IT-95-14/2-AR73.5, 18 September 2000.